No. 94-661

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

W.R. GRACE & CO.-CONN.,

Petitioner,

—v.—

MARYLAND CASUALTY COMPANY, ROYAL INDEMNITY COMPANY, AETNA CASUALTY and SURETY COMPANY and CONTINENTAL CASUALTY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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MARYLAND CASUALTY COMPANY, ROYAL INDEMNITY COMPANY, AETNA CASUALTY and SURETY COMPANY and CONTINENTAL CASUALTY COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

W.R. Grace & Co.-Conn. ("Grace") files this reply brief pursuant to Rule 15.6 of this Court to address a jurisdictional argument first raised in the brief in opposition filed by respondent Maryland Casualty Company ("Maryland"). Maryland argues that Grace's petition for certiorari, which was filed with this Court on October 13, 1994, was filed out-of-time. In so doing, Maryland has mischaracterized the procedural history and the import of the two rehearing petitions that Grace filed with the Second Circuit.

PROCEEDINGS AND DISPOSITION BELOW

No dispute exists as to the following facts.[1] On September 1, 1993, the Second Circuit issued its initial decision. (Resp. Br. at 5). On September 29, 1993, Grace filed a petition for rehearing and suggestion for rehearing en banc. (Resp. Br. at 7; Resp. App. 2a-3a). On January 11, 1994, the Second Circuit panel granted rehearing on the trigger of coverage issue only. (88a-89a). Various parties, including dozens of *amici*, submitted briefs in connection with the rehearing. (RA1-4). On May 16, 1994, the Second Circuit issued its amended opinion, which was essentially the same as the September 1, 1993 decision, with some non-substantive editing. (3a-28a; Resp. Br. at 7). A judgment reversing and remanding the district court's decision, consistent with the amended opinion, was filed on the same date. (la-2a). However, "[n]o order as to *in banc* consideration [from the original September 29, 1993 petition] was issued when the amended judgment was entered." (Resp. Br. at 7; *see* la-2a). On June 21, 1994, the Second Circuit entered an Order that (1) acknowledged that a panel rehearing had already taken place with regard to the September 29, 1993 petition and (2) denied Grace's original and contemporaneous suggestion for a rehearing en banc. (RA5-6).

According to the Second Circuit docket sheet, on May 31, 1994, Grace delivered to the Second Circuit a "petition for rehearing en banc" from the May 16, 1994 Amended Decision. (RA1). The docket sheet indicates that there was a "problem" with the petition that had to be resolved by the Clerk's Office and that the petition was not deemed to be filed until June 13, 1994. (RA1-2). The delay presumably was

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[1] Throughout this reply brief, citations to the appendix to Grace's petition for certiorari appear as "__a"; citations to the opposition brief and appendix filed by Maryland appear as "Resp. Br. at __" and "Resp. App. __a", respectively; and citations to Grace's reply appendix appear as "RA __."

occasioned by Grace's characterization of its petition as a "petition for rehearing en banc" instead of a "petition for rehearing with a suggestion for rehearing en banc," which would have been the proper nomenclature under Fed. R. App. P. 35 and 40. On June 13, 1994, according to the Second Circuit docket sheet, the Second Circuit filed Grace's "petition for rehearing, petition for rehearing in banc." (RA2). Thereafter, at least five amicus curiae briefs were filed by the Second Circuit; each of them was docketed as a "brief in support of petition for rehearing/rehearing in banc." (RA2-4). On July 15, 1994, the Second Circuit denied both of Grace's requests for relief. (RA7-8). The Second Circuit's mandate issued on July 22, 1994. (RA4).

In light of the confusing history of this case and in an effort to avoid the very dispute raised by Maryland now, Grace's counsel, mindful of the filing deadlines imposed by Rule 13.4, spoke with the Clerk of the Second Circuit and the Deputy Clerk of this Court in late July 1994 concerning the filing deadlines applicable to Grace's petition for certiorari. Grace then sent letters to each of the clerks confirming that July 15, 1994 was the date the 90-day time period for filing a petition for certiorari would start running, based on the Second Circuit's treatment of Grace's May 31, 1994 petition. (RA9-11). Grace's petition for certiorari was filed on October 13, 1994, within ninety days of July 15, 1994.

GRACE'S PETITION FOR CERTIORARI WAS TIMELY FILED AS IT WAS FILED WITHIN NINETY DAYS OF THE DENIAL OF GRACE'S PETITION FOR REHEARING

Relying on Rule 13.4 of this Court, which provides that the "time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered," Maryland argues alternatively that Grace's petition is out-of-time because (1) the petition that Grace filed on May

31, 1994 from the Second Circuit's May 16, 1994 Amended Opinion was not a proper petition for rehearing within the meaning of Rule 13.4, and/or (2) neither the Federal Rules of Appellate Procedure nor the Second Circuit's local rules permit the filing of "successive" petitions for rehearing. (Resp. Br. at 8-9). Neither argument is meritorious.

It is correct that the petition that Grace filed with the Second Circuit on May 31, 1994 seeking review of the Amended Opinion of May 16, 1994 was inappropriately styled as a "petition for rehearing en banc." The Federal Rules of Appellate Procedure do not provide for such a petition. *Missouri v. Jenkins*, 495 U. S. 33, 47 (1990); *see* Robert L. Stern *et al.*, *Supreme Court Practice*, § 6.3 at 286 n.20 (7th ed. 1993). However, the Clerk of the Second Circuit recharacterized and treated the petition as a "petition for rehearing containing a suggestion that the action be heard in banc." (RA7-8). That practice is neither unauthorized nor uncommon. *See Missouri v. Jenkins*, 495 U.S. at 47 & n.20; Advisory Comm. Notes on FED. R. APP. P. 35.[2]

Maryland's attempt to distinguish *Missouri v. Jenkins*, 495 U.S. 33, is unavailing. (Resp. Br. at 10 n.11). In that case, like this one, the petitioner had filed a "petition for rehearing en banc." *Id.* at 43. The Eighth Circuit denied the petition as labeled and issued its mandate in October 1988. *Id.* In January 1989, after the Supreme Court Clerk had rejected a petition for certiorari as being untimely filed, the Eighth Circuit recalled its mandate and issued a new order *nunc pro tunc*, recasting the "petition for rehearing en banc." as a "petition for rehearing with suggestion for rehearing en banc," *id.* at 44, reflecting its treatment of the filing as including both a petition for rehearing under Fed. R. App. P. 40 and a suggestion for rehearing en banc under Fed. R. App. P. 35.

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[2] "In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled 'petition for rehearing in banc.' Such a petition is in fact merely a petition for rehearing, with a suggestion that the case be reheard in banc."

The Supreme Court found that the "Court of Appeals interpreted and actually treated the [Petitioner's] papers as including a petition for rehearing before the panel," which the appellate court was authorized to do. *Id.* at 47-49. The Supreme Court acknowledged that the Eighth Circuit "knows more than we do about the meaning of its orders" and accepted the Eighth Circuit's denial of the "petition for rehearing en banc" as being a denial of a petition for rehearing for purposes of computing the filing time for the certiorari petition. *Id.* at 49-50.

Grace's case is even stronger, as the Second Circuit originally and explicitly denominated Grace's "petition for rehearing en banc" as both a petition for rehearing and a petition for rehearing en banc as reflected in the docket sheet entry for June 13, 1994, the filing date assigned by the court. (RA2). That act stayed issuance of the mandate. By Order of July 15, 1994, the Second Circuit again acknowledged both requests for relief and then denied them simultaneously. (RA7-8). The court's mandate subsequently issued on July 22, 1994. (RA4).

Maryland also argues that Grace could not file "successive petitions for rehearing." (Resp. Br. at 9 & n.9). However, the cases Maryland cites are distinguishable because, unlike this case, they did not involve successive petitions for rehearing where the second petition was filed only after the first one was granted, rebriefed, and an amended decision issued. Grace's September 29, 1993 petition addressed the Second Circuit's September 1, 1993 opinion; Grace's May 29, 1994 petition addressed the Second Circuit's amended decision of May 16, 1994, which issued after rehearing was granted and many principal and *amicus* briefs were filed. (RA2-4).

Accordingly, Grace's labeling of its May 31, 1994 petition notwithstanding, Grace's petition for certiorari should be considered timely filed. The Court should recognize the manner in which Grace's petition was treated by the Second Circuit, acknowledge Grace's timely and conscientious attempt to

abide by this Court's rules, as evidenced by its good faith communications with both this Court and the Second Circuit clerks' offices, and reject Maryland's attempt to avoid this Court's review of Grace's meritorious substantive arguments.

CONCLUSION

For all of the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel of Record
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Counsel for Petitioner W.R. Grace & Co.-Conn.

Dated: November 21, 1994

APPENDIX

APPENDIX

Excerpts From Second Circuit Docket Entries

Proceedings include all events,
91-9322 Maryland Casualty v. W.R. Grace, et al.

5/16/94	Judgment of the district court is REVERSED and REMANDED by published signed opinion filed. (RJC) (ona)
5/16/94	Judgment filed. (ona)
5/31/94	Amicus Curiae Commercial Union motion to file brief as amicus curiae in support of petition and suggestion for rehearing in banc FILED (w/pfs). [524892-1] (to EG w/copy of brief) (twn)
5/31/94	Amicus Curiae Commercial Union brief received. Problem: motion pending to file brief. (twn)
5/31/94	Appellant W.R. Grace petition for rehearing received. Problem: OG will inquire with KB as to the filing of this petition. (twn)
5/31/94	Appellant W.R. Grace appendix of unreported decisions and authoritites [sic] to petition for rehearing in banc received. Problem: (see petition for rehearing received). (twn)
5/31/94	Amicus Curiae Asbestos Claims Mage motion to file brief as amicus curiae in support of petition for rehearing FILED (w/pfs). [528485-1] (ona)
5/31/94	New party added: New York State School Board Association as movants, seeking leave to participate as amicus curaie on appeal. (unv)
5/31/94	Movant NYS School Board motion to participate as amicus curiae, to file brief as amicus curiae FILED (w/pfs). [529073-2] (unv)
6/1/94	Appellant W.R. Grace motion to allow filing of appendix of unreported decisions and appendix A attached to the back of the petition for rehearing in banc FILED (w/pfs). [525601-1] (ono)

6/9/94	Order FILED GRANTING motion to file brief as amicus curiae [524892-1] by Amicus Curiae Commercial Union, endorsed on motion form dated 5/31/94. (ona)
6/9/94	Order FILED GRANTING motion to file brief as amicus curiae [528485-1] by Amicus Curiae Asbestos Claims Mage, endorsed on motion form dated 5/31/94. (ona)
6/9/94	Order FILED GRANTING motion to participate as amicus [529073-1] by Movant NYS School Board, endorsed on motion form dated 5/31/94. (unv)
6/10/94	Appellee Royal Indemnity Co. letter in response en banc review received. (cc:panel) (ona)
6/13/94	Order FILED GRANTING motion to allow [525601-1] by Appellant W.R. Grace, endorsed on motion form dated 6/1/94. (ona)
6/13/94	Appellant W.R. Grace Petition for rehearing, petition for rehearing in banc [530706-2] with proof of service filed. (ona)
6/13/94	Appellant W.R. Grace appendix of unreported decisions and authorities of the petition for rehearing en banc filed w/pfs. (ona)
6/13/94	Amicus Curiae Commercial Union brief in support of petition for rehearing/rehearing en banc filed with proof of service. (ona)
6/13/94	Amicus Curiae Asbestos Claims Mage, and Amicus Curiae NYS School Board brief in support of petition for rehearing/rehearing en banc filed with proof of service. (ona)
6/13/94	Amicus Curiae Commercial Union brief in support of petition for rehearing/rehearing en banc filed with proof of service. (ona)

6/15/94 Amicus Curiae Continental Casualty motion to intervene/become party FILED (w/pfs). [530482-1] (ona)

6/17/94 Letter dated June 16, 1994, submitted by Rosa E. Ross, Legal Asst., in compliance of request for additional 15 copies of W.R. Grace's Appendix of Unreported Decisions and Authorities in support of its petition for rehearing in banc, received (ltr in acoo) (ono)

6/21/94 Order FILED DENYING suggestion for rehearing in ba.. [532190-1] by Appellant W.R. Grace, [532194-1] and Appellee Royal Indemnity. It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that vote be taken thereon. (ona)

6/24/94 Amicus Curiae Central Wesleyan, and Curiae Anderson Memorial motion to file supporting brief W.R. Grace's petition for rehearing en banc FILED. (w/pfs). [534308-1] (ona)

6/24/94 Amicus Curiae Central Wesleyan, and Anderson Memorial brief in support of petition for rehearing/rehearing en banc received. (motion pending) (ona)

6/29/94 Order FILED GRANTING motion to intervene/become party [530482-1] by Amicus Curiae Continental Casualty, endorsed on motion form dated 6/15/94. (ona)

7/5/94 Letter dated June 28, 1994, submitted by Anthony J. Marchetta, Esq., regarding Grace's pending petition for rehearing in banc, which is still pending, received (cc:acco) (ono)

7/7/94	Order FILED GRANTING motion to file supporting papers [534308-1] by Amicus Curiae Central Wesleyan, Anderson Memorial, endorsed on motion form dated 6/24/94. (ona)
7/7/94	Amicus Curiae Central Wesleyan, Amicus Curiae Anderson Memorial brief in support of petition for rehearing/rehearing en banc filed with proof of service. (ona)
7/11/94	Non-dispositive stipulation for Pitney, hardin, Kipp & Szuch, 26 East 64th Street, New York to be substituted as attorney for W.R. Grace & Co. RECEIVED. [539395-1] (ona)
7/15/94	Order FILED DENYING petition for REHEARING [530706-1] by Appellant W.R. Grace, endorsed on motion dated 6/13/94., DENYING petition petition [sic] for rehearing in banc [530706-2} by Appellant W.R. Grace, endorsed on motion dated 6/13/94. (ona)
7/15/94	Motion and Amicus brief in support of petition returned to Amicus Curiae Texas Independent, Amicus Curiae Texas Governmental. (Order dated 7/15 DENIED petition for rehearing) (ona)
7/22/94	Judgment MANDATE ISSUED. (ond)
8/19/94	Mandate receipt returned from the district court. (ren)
10/17/94	Notice of filing petition for writ of certiorari for Appellant W.R. Grace dated 10/13/94 filed. Supreme Ct.#: 94-661 (cv73)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 91-9322
Filed June 21, 1994

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of June on thousand nine hundred and ninety-four.

MARYLAND CASUALTY COMPANY,

Plaintiff-Appellee,

—v.—

W.R. GRACE AND COMPANY

Defendant-Appellant.

CONTINENTAL CASUALTY COMPANY; AETNA CASUALTY & SURETY COMPANY and GENERAL INSURANCE COMPANY OF AMERICA;

Defendants,

ROYAL INDEMNITY COMPANY; AETNA CASUALTY AND SURETY COMPANY,

Defendants-Appellees.

Petitions for rehearing with suggestions for rehearing in banc having been filed herein by counsel for defendant-appellant W.R. GRACE & COMPANY, and defendant-appellee ROYAL INDEMNITY COMPANY, each on September 29, 1993, and the panel that heard the appeal having granted said petitions for rehearing in an order filed on January 11, 1994, and new briefs having been filed by same parties, and an amended opinion having issued May 16, 1994.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk

By: /s/ CAROLYN CLARK CAMPBELL
Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 91-9322
Filed July 15, 1994

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of July on thousand nine hundred and ninety-four.

MARYLAND CASUALTY COMPANY,

Plaintiff-Appellee,

—v.—

W.R. GRACE AND COMPANY

Defendant-Appellant.

CONTINENTAL CASUALTY COMPANY; AETNA CASUALTY & SURETY COMPANY and GENERAL INSURANCE COMPANY OF AMERICA;

Defendants,

ROYAL INDEMNITY COMPANY; AETNA CASUALTY AND SURETY COMPANY,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by Appellant W.R. GRACE AND COMPANY on June 13, 1994

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:

FOR THE COURT,
GEORGE LANGE III, Clerk

By: /s/ KATHY BROUWER
Kathy Brouwer, Operations Mgr.

JUL 15 1994
(Date)

[LETTERHEAD OF PITNEY, HARDIN, KIPP & SZUCH]

Received stamp dated July 27, 1994
Office of the Clerk
Supreme Court, U.S.

July 26, 1994

VIA OVERNIGHT MAIL
Mr. Frank Larson
Chief Deputy Clerk
United States Supreme Court
Supreme Court Building
One First Street, N.E.
Washington, DC 20543

Re: Maryland Casualty Company v.
W.R. Grace & Co.-Conn., United States
Court of Appeals for the Second Circuit,
Docket No. 91-9322

Dear Mr. Larson:

This is to confirm our conversation today in which you advised that although we captioned a motion which we made on May 31, 1994, in the Second Circuit Court of Appeals on behalf of W.R. Grace & Co.-Conn. as a "Petition for Rehearing En Banc," the Second Circuit correctly re-characterized the motion as a petition for a panel hearing and a suggestion for rehearing en banc. Accordingly, July 15, 1994, the date on which the Second Circuit denied the motion, is the date from which we must calculate the 90-day period for filing a petition for certiorari with the United States Supreme Court.

We have enclosed a copy of the Second Circuit's July 15 Order. If, upon seeing this document, you have a different opinion about the nature of the order and, therefore, about the

date from which the 90-day filing period begins to run, would you please contact me as quickly as possible.

Thank you for clarifying this important matter.

Very truly yours,

/s/ CATHERINE E. TAMASIK
Catherine E. Tamasik

Handwritten Notation:

I have not changed my opinion—
/s/ FRANK LARSON
Frank Larson

enc.

[LETTERHEAD OF PITNEY, HARDIN, KIPP & SZUCH]

July 27, 1994

REVISED
VIA FAX
Ms. Carolyn Campbell
Chief Deputy Clerk
United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

Re: Maryland Casualty Co. v. W.R. Grace & Co.-Conn., Docket No. 91-9322

Dear Ms. Campbell:

This is to confirm that the Second Circuit treated W.R. Grace & Co.-Conn's ("Grace") May 31, 1994 petition for rehearing en banc as a "petition for rehearing with a suggestion for rehearing en banc." The Chief Deputy Clerk of the United States Supreme Court, Mr. Frank Larson, similarly views Grace's May 31 petition as a petition for rehearing with a suggestion for rehearing en banc. Accordingly, Mr. Larson advised us that July 15, 1994, the date on which the Second Circuit denied Grace's petition, is the date from which we must calculate the 90-day filing period for a petition for certiorari to the Supreme Court.

I have enclosed a copy of the confirming letter that we sent to Mr. Larson along with a copy of the Second Circuit's July 15, 1994 order. Should your view of the proper characterization of Grace's May 31 petition change upon further reflection, please let us know immediately. Thank you for your advice in this matter.

Very truly yours,

CATHERINE E. TAMASIK

enc.
cc: A.J. Marchetta, Esq.
P.G. Barber, Esq.